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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

BROOKPARK NEWS & BOOKS, INC., *et al.*,
Petitioners,

vs.

CITY OF CLEVELAND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio

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QUESTIONS PRESENTED FOR REVIEW

- I. Where zoning regulations do not forbid granting of an application for a change in a "use permit", does the Board of Zoning Appeals deny a business its rights under the First and Fourteenth Amendments to the United States Constitution by denying such a change in a "use permit"?
- II. Where zoning regulations and applicable state law are satisfied, is a decision by a Board of Zoning Appeals, which denies a "use" variance unconstitutional, and unsupported by a preponderance of substantial, reliable and probative evidence?

PARTIES BELOW

Petitioner Brookpark News & Books, Inc. is an Ohio corporation which was a Plaintiff below in the trial court, and was an Appellant in the Ohio Court of Appeals and the Ohio Supreme Court.*

Petitioner Joel Kamenski was also a Plaintiff in the trial court, and Appellant in the Ohio Court of Appeals and the Ohio Supreme Court; pursuant to his position as an officer of the corporation.

Respondents, the City of Cleveland, Charles Sheboy (Commissioner of Building and Housing for the City of Cleveland), and the Cleveland Board of Zoning Appeals, were Defendants in the trial court below, and Appellees in the Ohio Court of Appeals and the Ohio Supreme Court.

28.1 STATEMENT

Brookpark News & Books, Inc. is an Ohio corporation which has no other affiliates or subsidiaries, and is not owned by another corporation.

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No.

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioners, Brookpark News & Books, Inc., et al. pray that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered on September 10, 1986, dismissing the appeal and overturning Appellant-Petitioners' Motion to Certify the Record to review the decision of the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, filed on May 22, 1986, overruling Appellant-Petitioners' Assignments of Error I and III, thereby affirming, in part, the decision of the Court of Common Pleas of Cuyahoga County, Ohio filed on July 3, 1985.

CITATIONS TO OPINIONS BELOW

The Journal Entry of the Ohio Supreme Court is reported at Vol. 26, Ohio Official Reports, No. 1, at p. A-5 (September 15, 1986), and is set forth in the Appendix, *infra*, at page A1. The opinion of the Court of Appeals for Cuyahoga County, Ohio Eighth Appellate District is unreported and is set forth in the Appendix, *infra*, at page A2.

JURISDICTION

The Judgment of the Ohio Supreme Court was rendered and filed on September 10, 1986. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1257(3).

CONSTITUTIONAL AND CITY ORDINANCE PROVISIONS INVOLVED

United States Constitution, Amendment I, See Appendix A35.

United States Constitution, Amendment XIV, Section 1, See Appendix A35.

28 U.S.C. 1257(3), See Appendix page A35.

Ohio Constitution, Article I, §II, See Appendix A37.

Ohio Revised Code §2506, Appendix A37.

Codified Ordinances of the City of Cleveland, §§343.01 and 343.11, See Appendix page A29.

STATEMENT OF THE CASE

This appeal arises from an appeal to the Cleveland Board of Zoning Appeals, calendar number 83-359, which came on for hearing on February 13, 1984.

The Board of Zoning Appeals denied the variance and the matter was timely appealed to the Cuyahoga Court of Common Pleas. Three assignments of error were asserted, including questioning the constitutionality of the subject ordinances. The Court of Common Pleas dismissed the matter on July 3, 1985 based on the briefs and file

and without oral hearing or a trial of the new issues raised on appeal. Moreover, no specific ruling was made on the constitutional matters asserted therein. From the decision of the Court of Common Pleas, Appellants (Petitioners) brought this matter before the Eighth District Court of Appeals. Four (4) Assignments of Error were raised (see A3).

On May 22, 1986, the Court of Appeals entered its ruling wherein it overruled Assignments of Error I and III, but found merit in Assignments of Error II and IV; upon which the case was reversed and remanded back to the trial court.

From the decision of the Court of Appeals regarding Assignments of Error I and III, Appellants brought this matter before the Supreme Court of Ohio. On September 10, 1986, the Supreme Court of Ohio overruled Appellants' (Petitioners') motion to certify the record (see A1).

From the decision of the Ohio Supreme Court denying certiorari, Petitioners (Appellants) bring this matter before the Supreme Court of the United States.

STATEMENT OF THE FACTS

Petitioner, Brookpark News and Books, Inc. is an Ohio Corporation which leased the premises known as 16700 Brookpark Road, Cleveland, Ohio from Marie and Joseph Wade. On September 16, 1983 Petitioners secured permit M-102047 to add a one-story addition to the building for display and storage. A use permit, M-103443 was issued December 2, 1984 to use the structure for retail sales of news and books. Subsequent to an inspection of the premises, the use of permit M-103443 was revoked for

the reason the actual use was allegedly in violation of the City's zoning code (A13). More specifically, the letter stated that the apparent use was not permitted within 1,000 feet of an adult bookstore and mini-motion picture theatre, in a General Retail Zone. An appeal was made to the Board of Zoning Appeals regarding the revocation of the permit which was granted, reinstating the permit to use the building as a bookstore (A14).

In Calendar No. 83-359 Petitioners asked permission to convert the building to an adult bookstore and adult mini-motion picture theatre (A16). The City, in the Notice of Appeal, had determined that such a proposed use would be violative of Sections 343.01 and 343.11 of the Codified Ordinances. The full text of the pertinent ordinances is set out in the Appendix (A29).

The essential issue is not that the proposed use was prohibited in the subject General Retail area but that certain spacing requirements must be adhered to for issuance of the "use" permit. The pertinent part of Section 343.01 (c) (2) (e) prohibits *more* than two Adult Bookstores within 1,000 feet of each other. This particular provision only regulates adult bookstores in a *Local* Retail District. The controlling ordinance for Adult Bookstores in a *General* Retail District is Section 343.11(b)(2) wherein there is *no* restriction as to the number of adult bookstores or in their spacing. Section 343.11(L) permits adult mini-motion picture theatres within a General Retail District subject to the provision that not *more* than two may be within 1,000 feet of each other. It is further provided that an adult mini-motion picture theatre may not be located within 1,000 feet of an adult bookstore.

In a companion case before the Board of Building Standards and Appeals, Docket No. A-7-84, an appeal was

made to void permit M-103418 regarding a nearby property at 16500 Brookpark. In that case the City had issued a permit on November 30, 1983 changing the "use" of a nearby establishment from a bookstore to a "Bookstore, Adult Bookstore and Adult Coin Mini Movies and Items" (A20). On appeal the Board of Building Standards and Appeals voided the permit M-103418, returning the use of 16500 Brookpark to a bookstore (A22). Whether or not the "use" at 16500 Brookpark was for a bookstore or an adult bookstore and mini-movie theatre is especially germane to this appeal in that the City's unlawful issuance of the permit at 16500 Brookpark may have precipitated the denial of a use permit at 16700 Brookpark.

A public hearing in the Appeal of Calendar No. 83-359 was held on February 13, 1984 and the appeal was denied (A25).

Thereafter, a Notice of Appeal was filed with the Board of Zoning Appeals and the Court.

REASONS FOR GRANTING THE WRIT

I. A BOARD OF ZONING APPEALS MAY NOT DENY AN APPLICATION FOR A CHANGE IN A "USE PERMIT" WHEN SUCH ACTION BY THE BOARD IS CONTRARY TO LAW.

The first order of business in addressing this issue is to ascertain the exact sections of the Codified Ordinances of the City of Cleveland which would be controlling in the matter before the Court. The Board of Zoning Appeals in its "Official Notice" stated that Petitioners sought permission to convert the premises to an adult bookstore

and mini-motion picture theatre (A16). The notice went on to say:

“... said conversion being contrary to the provisions of Sections 343.01 and 343.11 of the Codified Ordinances.”

This statement, in and of itself, generated more confusion in the case than was warranted. Section 343.01 has absolutely no bearing on the case in regard to the spacing of adult bookstores. The pertinent provisions of that section pertain to Local Business Districts *only*. While it is conceded that Section 343.01(b) defines adult bookstores for purposes of the Chapter, Section 343.01(c)(2)(3) is not applicable. The (2)(e) subsection delineates the adult bookstore spacing requirement *only* for Local Retail Business Districts. The spacing requirements therein are not extrapolated into the regulations of General Retail Business Districts.

Section 343.11(b)(2) makes specific reference to the adult bookstore provisions of Section 343.01(b) by stating that:

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part, for other than one or more of the following specified uses:

- (1) Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in any Local Retail Business District.
- (2) *All retail business uses and buildings specified in Section 343.01(b) and uses and buildings to provide for . . .*” (Emphasis added)

This section clearly obviates the spacing limitations required under Section 343.01(c)(2)(e) in Local Retail Districts. It should be specially noticed that the "Notice of Violation of Building Ordinances" (A27) issued by the Building Department did not cite a violation of Section 343.01. Therefore it is presumed that adult bookstores are permitted in General Retail Business Districts without spacing restrictions as between other adult bookstores.

The confusion regarding the applicability of Section 343.03 more than likely emanates from the fact that the printed zoning regulation manual utilized by the Building Commission and the Zoning Board differs significantly from the ordinance as enacted and as published in the "City Record" the official publication of Cleveland's legislative enactments.

Attached as Appendix (A29) is the relevant legislation regarding this matter as it was originally enacted by The Cleveland City Council. Appendix (A29) evidences the ordinances as they are printed in the manual used by City officials. A cursory comparison of the language and numeration contained in Section 343.01 as between the actual legislation and that of the manual clearly illustrates the errors.

The discrepancies become even more glaring when the ordinance in one section refers to language used in another section, as is the case in Section 343.11(b)(2). When utilizing the manual (A32) for this Section 343.11(b)(2) it is clear that there is a 1,000 foot spacing limitation for "Adult" bookstores, even in a General Retail Business District. However, when the subsections of the actual ordinance are applied, subsection (343.11) (b) (2) refers to only subparagraph 343.01(b). The spacing limitations of the following subsection (c) are clearly dropped due

to the fact that a General Retail Business District was intended to be less restrictive than a Local Retail Business District. The *manual* has mislabelled subsection (c) as (b), thereby changing the entire applicability of this section.

At this juncture it would be appropriate to refer to the neighboring, impacted establishments. To the West is a tavern, the Parklane Lounge at 16800 Brookpark. Interstate 480 is beyond the Parklane and to the North of the premises. To the East is the Moulin Rouge Bar at 16600 Brookpark. Further to the East, at 16500 Brookpark in the rear, is a mini-motion picture theatre known as the House of Movies. In front of the House of Movies is a building which, at the time of the hearing was a closed bookstore known as the House of Books. Further east were located another bar and junkyard. The City of Brookpark is located to the South. The only establishment in the vicinity which would even remotely trigger the 1,000 foot restrictions of Section 343.11 would be the House of Movies, a mini-motion picture theatre and the bookstore at 16500 Brookpark.

Assuming that a discussion of the spacing requirements of Section 343.01(c)(2)(e) is no longer germane, we now turn to the controlling section of the ordinance. Pursuant to Section 343.11(b)(2)(L), adult mini-motion picture theatres are permitted in a General Retail Business District provided (A29):

.... that *not more than two* of the following uses shall be within 1,000 feet of each other:

1. Adult motion picture theatre.
2. Adult mini-motion picture theatre.
3. Pool or billiard halls.

4. Premises having as their main or primary use pinball machines.

Provided further that the use as specified in subsection L.1. through 4. inclusive of this subsection shall not be within 1,000 feet of any adult bookstore as set forth in Section 343.01. . . . (emphasis added)

The law is clear that one or two adult mini-motion picture theatres may be within 1,000 feet of each other but not three or more. Since there was only one other mini-motion picture theatre within the 1,000 foot restriction, another mini-theatre site would be permissible provided there was no adult bookstore within 1,000 feet.

The crux of this case now becomes whether or not the proposed use would be within 1,000 feet of an *adult* bookstore. The City's decision to deny the "use permit" was predicated on the fact that there had been an adult bookstore at 16500 Brookpark. That bookstore, however, was leased by Petitioners but their "adult" use had been discontinued because the business was to move into the new facility at 16700 Brookpark.

The House of Books at 16500 Brookpark was originally operating under a use permit that was for a bookstore, *not* an adult bookstore (A18). During the pendency of the instant permit application, the landlord at 16500 Brookpark changed the use permit at the neighboring site wherein that became a "bookstore, adult bookstore and adult coin mini-movies and items."

Concurrent with this appeal to the Board of Zoning Appeals, and in response to the changed use above, a separate appeal was made to the Board of Building Standards and Appeals wherein the revised use permit undertaken by the landlord was voided. The ruling by the Board of

Building standards held that the landlord had wrongfully changed the permit and that the permit should have remained for a bookstore only (A22). Based on the fact that the use permit at 16500 Brookpark was for a bookstore and not an adult bookstore and the fact that there was no adult bookstore in operation at 16500 Brookpark at the time of this appeal to the Board of Zoning Appeals nor at the time of the request for a proper use permit for 16700 Brookpark, there could not have been a violation of Section 343.11 nor should there have been a denial of the permit request.

The fact that the proposed use at 16700 Brookpark would have combined the uses of adult bookstore and mini-motion picture theatre in one facility does not violate the Code in that the city has never prohibited such a combination. As Mr. Costanza, Secretary to the Board of Zoning Appeals, stated at the Board's hearing:

By Reverend Palmer: A question, and I don't know if it's relevant at this time, what does the Code say about an adult bookstore and mini-theatre operating in the same premises?

By Mr. Costanza: The Code is silent.

By the Chairman: The Code is silent, Reverend.

By Mr. Costanza: The Code merely states distances from each other, but it does not state anything as to whether it can be in the same building.

By Reverend Palmer: Could it be construed that that's within one thousand (1,000) feet of each other?

By Mr. Costanza: Well, Mr. Chairman, it could be construed as such, but obviously the Building Department has not construed that in the history of this ordinance.

There being no objection by the city to a dual use elsewhere in similarly situated premises, it is felt that the City is estopped from such an assertion here. Enforcement of the ordinance regarding dual use against Petitioners would be a flagrant denial of Equal Protection under the law. Nearly 100 years ago, in the landmark decision of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court condemned the kind of discrimination which would occur if the ordinance were enforced regarding dual uses. *Yick Wo* involved a municipal ordinance requiring a license to operate a laundry. City officials regularly denied such a license to Chinese persons, while granting licenses to all others who applied. The Supreme Court condemned this practice as a violation of the Equal Protection Clause in an opinion which included the following memorable and oft-repeated language:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Id.*, at 118 U.S. 373.

In the present case, Section 343.11, though impartial on its face, if enforced by the Respondents with an equally "evil eye" and "unequal hand," *solely* against the Petitioners and against *no* other business, it would be for the purpose of suppressing the exercise, by Petitioner, of its First Amendment right to distribute literature. The Equal Protection Clause does not tolerate governmental discrimination which burdens the exercise of First Amendment rights, unless it furthers a compelling state interest

unrelated to the suppression of constitutionally protected expression. See *Carey v. Brown*, U.S., 48 L.W. 4756; *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *San Antonio School District v. Rodriquez*, 411 U.S. 1, 34, n. 75 (1973). In this case the City of Cleveland cannot possibly have a rational, let alone compelling, interest in enforcing an ordinance which applies to all similar businesses against only a single business. Such unequal treatment is contrary to law as enacted and enforced in the City of Cleveland.

Accordingly, for the reasons stated, the unequal application of these ordinances by the Board of Zoning Appeals is contrary to law and unconstitutional, and the decision of the Court of Appeals affirming this action should be reversed.

II. A DECISION BY THE BOARD OF ZONING APPEALS IS UNCONSTITUTIONAL, AND UNSUPPORTED BY A PREPONDERANCE OF SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE WHERE PETITIONER SATISFIED THE REQUIREMENTS OF SECTION 329.03 OF THE CODIFIED ORDINANCES OF THE CITY OF CLEVELAND, AND CONSOLIDATED MANAGEMENT, INC. v. CLEVELAND, 6 Ohio St. 3d 238, 241 (1983).

In order to obtain a "use" variance, three requisites must be met under Section 329.03 of the Codified Ordinances of the City of Cleveland. Those standards were recently determined by the Supreme Court of Ohio to be essential in granting a "use" variance. The Court stated

in *Consolidated Management, Inc. v. Cleveland* (1983), 6 Ohio St. 2d 238, at page 241 of the opinion:

It is necessary that the Board of Zoning Appeals read, and apply, each subsection of Ordinance Section 329.03 *in pari materia*. Accordingly, in order for the Board to grant a specific variance, subsections 329.03 (b) (1), (2) and (3) require that each applicant prove that the zoning classification presents an unnecessary hardship or practical difficulty to the intended use of the property; that refusal of the variance will deprive the owner of substantial property rights; and that the granting of the variance would not be contrary to the intent of the zoning code. Here, we hold that the Appellees have not sustained the burden of proving that they were entitled to the variance.

And at page 243 stated:

Therefore, the ordinance clearly sets forth three conditions that must be met by the one seeking a variance prior to the board's exercising the grant of such variance. There are, quite apparent in this ordinance, standards to govern the exercise of the council's delegation of authority to this agency. (Emphasis added)

Petitioners met those three conditions throughout the record:

(1) The store at 16700 was leased on a long term basis under the assumption that (a) adult bookstores and adult mini-motion picture theatres are permitted uses in a General Retail Business District; (b) their new use of 16500 Brookpark as an establishment would not be within the penumbra of "adult" uses, and therefore the only "adult" use in the vicinity would be the mini-theatre in the rear of 16500 Brookpark; (c) the new establishment

at 16700 Brookpark would be the *only* "adult" use within that General Retail Business District; and (d) the dual use at 16700 would be permissible because of its permitted existence elsewhere in the City. Petitioners justifiably relied on the wording of the Official City Code and they cannot be held to have created their own hardship when the Official City Code differs from the version contained in the "handbook" used and relied on by various city departments. This lease creates a hardship or practical difficulty if the Petitioners are not allowed to operate the facility as proposed. That is and has been their business as is evidenced by the operation for a number of years at 16500 Brookpark.

(2) The refusal to grant the variance will deprive the Petitioners of substantial property rights in that they will be unable to have the free use of their property, they will be deprived of their business opportunities and their constitutionally guaranteed right of freedom of expression would be restricted.

(3) Compliance with the intent of the Zoning Code, probably the most important of the three standards, is readily achieved. The intent of Section 343.11 of the Zoning Code was to disperse "adult" uses within General Retail Business Districts. The testimony at the hearing clearly established that no other "adult" use existed in the district. More importantly, the adjacent district, General Industry, is even less restricted. In such a General Industry District there is *no* restriction as to size, spacing, type or numbers of "adult" uses. In the record, on the maps and aerial photographs, it is clearly evident that the site is surrounded by bars, junkyards, interstate highways, and an industrial district which contains some of the largest industrial plants in the City.

The Zoning Board chose to ignore these demonstrated factors and was swayed by the emotional and personal opinions of witnesses from all over the County who testified as to their biases regarding constitutionally protected speech. Chief Judge Frank J. Battisti stated in his recent Opinion in *West Side Women's Services, Inc. et al. v. City of Cleveland, Ohio*, 573 F. Supp. 504 (1983) that:

A municipality has no legitimate interest in shielding certain members of a community from constitutionally protected activities which they find offensive on personal, moral, or even religious grounds.

On the record Petitioners provided more than enough evidence to meet the threshold criteria under Section 329.03.

Chapter 2506.04 of the Ohio Revised Code (A37) requires that a decision by an agency such as the Board of Zoning Appeals be constitutional, and supported by a preponderance of substantial, reliable and probative evidence. In the case at bar the preponderance of the evidence clearly supports an award of variance. Not one iota of evidence, other than the proscribed moral judgments of the witnesses supported the denial of the variance. In fact, the only probative evidence indicated that by relocating the Petitioners' business there would be no deleterious impact on the community.

A Court is given wide latitude in resolving the dispute of a wrongful denial of a variance. In Ohio under *Dudukovich v. Housing Authority* (1979), 58 Ohio St. 2d 202, 207, 389 N.E.2d 113 the decision of an agency such as the Zoning Board must adhere to the following standard:

. . . If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not

exist, the Court may reverse, vacate, modify or remand.

The Board of Zoning Appeals, the Trial Court, and subsequently the Court of Appeals erroneously found that the building located at 16500 Brookpark Road housed adult bookstores. It was based on said finding that the Board concluded that the Petitioners' proposed adult bookstore and adult mini-motion picture theatre would be located within 1000 feet of another adult bookstore and therefore, in violation of Cleveland Codified Ordinance 343.11. *Id.* Petitioners contend that said finding was contrary to the uncontested evidence presented at the hearing before the Board and thus aided the Board in reaching an unjustified and wholly unsupported conclusion.

In determining whether a ruling is against the manifest weight of the evidence, the Reviewing Court must find that there existed "some competent, credible evidence going to all the essential elements of the case" in order to sustain the judgment. *C. E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279, 280.

In the case *sub judice* Theresa Ball, the Manager of the Brookpark News which is Petitioners' business located at 16700 Brookpark Road, testified that the adult bookstore was to be relocated.

Moreover, Timothy John O'Connor, a witness for Respondents gave testimony which corroborated Ms. Ball's testimony:

By Mr. O'Connor: I know that one is closed now.

I was by there yesterday. Since the door has plastic bags taped over it, I couldn't really look inside to see whether or not there was pornographic material still on the premises.

By Mr. Rogers: You indicated that there was a store at 16500 which is closed.

By Mr. O'Connor: Yes, it is closed.

Respondents did not provide competent or credible evidence with which to sustain the decision rendered by the Board of Zoning Appeals, the Trial Court, and the Court of Appeals.

A place of business which is closed, no longer in operation, cannot be deemed to have a continued existence. To consider it so defies all logic.

Since no adult bookstore existed at 16500 at the time the Petitioners opened their business at 16700 Brookpark Road, the Board cannot find that Petitioners would be in violation of Section 343.11. There being no adult bookstore within 1,000 feet of the proposed use at 16700 Brookpark this Section 343.11 has no applicability.

Wherefore, Petitioners respectfully request this Court to find that the decisions of the Board of Zoning Appeals, the Trial Court, and Court of Appeals were against the manifest weight of the evidence, and in violation of Petitioners' rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The record in this case reveals that Section 343.11 of the Codified Ordinances of the City of Cleveland tramples upon the constitutionally guaranteed right of Petitioners and is contrary to law. Moreover, should the Code, as applied to Petitioners, be upheld then the granting of a variance would necessarily follow.

We hope the Court will not succumb to the lamenting of a few individuals attempting to censor the fundamental rights guaranteed to all. Justice Stevens in the Opinion

in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62, 96 S. Ct. 2440 (1976), stated:

The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

It is the duty of this Court to do all within its power to carry out the spirit and the letter of the law as enunciated repeatedly throughout the history of the nation and as so eloquently summarized above by Justice Stevens.

CONCLUSION

Petitioners respectfully submit that the Supreme Court of the United States should grant certiorari for these reasons:

1. This case presents issues concerning the Zoning Board's interpretation and implementation of specific city code sections which seriously affect the constitutional rights of citizens and business all of which require clarification by the Supreme Court of the United States.
2. This case presents an issue concerning serious violations of Petitioners' First Amendment freedom of speech and Fourteenth Amendment equal protection rights which require resolution by the Supreme Court of the United States.
3. This case presents issues concerning improper application of the Ohio Supreme Court's holding in *Consolidated Management, Inc. v. Cleveland*, 6 Ohio St. 3d

238 (1983) which requires resolution by the Supreme Court of the United States.

4. This case presents issues which arise frequently when citizens and businesses apply for use permits and/or variances. It is of great public and general interest and should be resolved by the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX

**ORDER OF SUPREME COURT OF OHIO
DISMISSING APPEAL**

(Dated September 10, 1986)

Case No. 86-1195

**THE SUPREME COURT OF OHIO
COLUMBUS**

BROOKPARK NEWS & BOOKS, INC., et al.,
Appellants,

v.

CITY OF CLEVELAND, et al.,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by Rogers, Horton, Forbes & Teamor.

/s/ FRANK D. CELEBREZZE
Chief Justice

**JOURNAL ENTRY AND OPINION OF THE COURT
OF APPEALS FOR CUYAHOGA COUNTY**

(Decided May 22, 1986)

No. 50651

**COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA**

BROOKPARK NEWS & BOOKS, INC. *et al.*

Plaintiff-Appellants,

vs.

CITY OF CLEVELAND, *et al.*,

Defendant-Appellees.

JOURNAL ENTRY AND OPINION

CHARACTER OF PROCEEDINGS:

**CIVIL APPEAL FROM THE
COMMON PLEAS COURT
CASE NO. 071,205**

JUDGMENT:

REVERSED AND REMANDED

CORRIGAN, J.:

This appeal arose from an application for a change of use from a bookstore to an adult bookstore and a motion picture theater, the denial thereof, and a subsequent appeal to the Board of Zoning Appeals. The use variance was denied by a resolution of the Board and the appellant took an appeal to the Common Pleas Court pur-

suant to R.C. 2506. The Common Pleas Court affirmed and the appellant raises four assignments for our review:

- I. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS CONTRARY TO LAW.
- II. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS UNCONSTITUTIONAL, ARBITRARY, CAPRICIOUS AND UNREASONABLE.
- III. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS UNSUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE.
- IV. THE TRIAL COURT ERRED IN NOT CONDUCTING A TRIAL DE NOVO OF APPELLANTS' REQUEST FOR A VARIANCE AND PERMIT FOR THE REASONS THAT APPELLANTS RAISED CONSTITUTIONAL ISSUES IN THEIR APPEAL FROM THE DECISION OF THE BOARD OF ZONING APPEALS.

On December 2, 1983, Brookpark News & Books, Inc. received a use permit for the retail sales of new[s] and books at 16700 Brookpark. On December 28, 1983 an application was made by Brookpark News & Books to change the use to an adult bookstore and an adult mini-motion picture theater. The request was denied on the basis that the operation was within 1000 feet of an existing adult bookstore and a mini-motion picture theater both

located at 16500 Brookpark. Those operations were housed in separate buildings on that lot. The proposed use was located within 280 feet of the existing bookstore and 300 feet from the mini-motion picture theater. An appeal was filed with the Board of Zoning Appeals which was denied. That decision was affirmed by the Common Pleas Court and Brookpark News brought this appeal.

I.

In its first assignment of error, the appellant contends that the trial court erred in affirming the Board of Zoning Appeals' decision as it was contrary to law. Since the resolution of this assignment as well as the second assignment hinges upon an interpretation of provisions of the City of Cleveland Zoning Code, the requirements of the Code will be discussed in some detail.

Chapter 343 of the Cleveland Zoning Code governs the permitted buildings and uses for the various types of districts within the confines of Cleveland. A portion of Chapter 343 addresses specifically the permitted uses of adult movie theaters and bookstores. Those sections contain anti-clustering provisions which attempt to prevent the concentration of adult movie theaters and adult bookstores in various areas throughout the City of Cleveland. The express purpose was to control certain adverse effects in the neighborhoods in which such businesses are situated which tend to contribute to the blighting and downgrading of surrounding neighborhoods, causing surrounding neighborhoods to give the appearance of decline, both economically and residentially. To achieve that end the Code imposes certain spacing requirements on these uses as a direct attempt to prevent the clustering of adult theaters and bookstores and the accompanying debilitating effect on the surrounding areas.

Section 343.01 outlines permitted uses in local retail districts defined as follows:

(1) "Local Retail District" means a business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only.

The Code then lists the permitted uses in such districts. In pertinent part it provides in Section 343.01(B)(2)(E):

E. The sale of books, magazines, newspapers, cigars, drugs, flowers, gifts, music, photographic goods, sporting goods, stationery, provided however, that not more than two adult book stores shall be within 1,000 feet of each other. Nor shall such adult book stores be within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976.

Thus, subject to the spacing restrictions, adult movie theaters are permitted in local retail business districts. Section 343.11 defines general retail business districts as follows:

343.11 General Retail Business Districts.

(a) *Definitions.* For the purposes of this chapter, certain terms are defined as follows:

(1) "General retail business" means an enterprise for profit for the convenience and service of, and dealing directly with, and accessible to, the ultimate consumer; neither injurious to adjacent premises

or to the occupants thereof by reason of the emission of cinders, dust, fumes, noise, odors, refuse matter, smoke, vapor or vibrations; nor dangerous to life or property. It includes buildings or spaces necessary to a permitted use for making or storing articles to be sold at retail on the premises. Except as provided in subsection (b) hereof, it does not include any establishment which supplies a retail outlet other than that on the premises, or any building or use specifically mentioned as permitted only in a Semi-Industry or Industry District.

The property at issue here is located in a general retail business district. Section 343.11(b) outlines permitted uses in such areas as follows:

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses:

(1) *Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in any Local Retail Business District.*

(2) *All retail business uses and buildings specified in Section 343.01 (b), and uses and buildings to provide for: * * *. [Emphasis added.]*

Thus, uses permitted in local retail areas are also permitted in general retail subject to the same restrictions. Section 343.11(b) goes on to outline additional permitted uses including the permitted use of adult movie

theaters which are not permitted in local retail areas. That section, 343.11(b)(2)(L), provides:

L. Amusement and recreation: armory, assembly hall, bowling alley, dance hall, pool and billiards, theater, skating rink or other social, sport or recreation center operated as a business, provided the place or building in which it is operated is sufficiently sound-insulated to effectively confine the noise to the premises, and provided further that such building or premises is located in conformity with the provisions of Section 347.03; *provided, however, that not more than two of the following uses shall be within 1,000 feet of each other:*

1. Adult motion picture theatre.
2. Adult mini motion picture theatre.
3. Pool or billiard halls.
4. Premises having as their main or primary use pinball machines.

Provided further that the use as specified in subsection L. 1. through 4. inclusive of this subsection shall not be within 1,000 ft. of any adult book store as set forth in Section 343.01; nor within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. [Emphasis added.]

Thus, contrary to the appellant's position, adult bookstores in a general retail area are subject to the spacing requirements of Section 343.01(b)(2)(E) and adult theaters are permitted in such areas subject to Section 343.11(B)(2)(L). Therefore, the requirements of both Sections are

germane to this appeal. Such a reading of these ordinances is consistent with the intent of the Zoning Code, permitting more uses in the less restricted general retail areas.

Under the ordinances then, no more than two adult bookstores or theaters are permitted within 1,000 feet of each other in a general retail area. The evidence herein established that the 16500 Brookpark lot had two buildings on it, one housing an adult mini-movie theater and the other housing a bookstore. On November 30 1983, the City issued a permit changing the use of that establishment from a bookstore to an adult bookstore. This permit was outstanding at the time the appellant applied for a permit at 16700 Brookpark. The appellant insists that the operation of an adult bookstore at 16500 Brookpark had ceased and therefore that permit should not bar the issuance of a permit for 16700 Brookpark. The fact remains that outstanding permits existed for two of the regulated uses at the time of the appellant's application. The issuance of a third permit would have been in direct contravention of the City Ordinances. This assignment is overruled.

II.

The appellant's second and fourth assignments will be addressed together as they present related issues. The appellant's briefs filed in the trial court presented two constitutional issues. First, it argued that the ordinances did not specify whether the spacing restrictions apply when there are two existing regulated uses within 1,000 feet but which are in an adjacent but differently zoned area. Thus, the appellant argued that the ordinances are unconstitutionally vague in that they fail to give a person of ordinary intelligence fair notice that his contemplated

conduct is forbidden by the statute. *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156; *United States v. Harriss* (1953), 347 U.S. 612.

Their second contention is that under the ordinances, adult bookstores receive more favored treatment than do theaters. In support, they argue that bookstores are permitted on a limited basis in local retail areas and are unrestricted in general retail areas. This contention is erroneous. The ordinances regulated bookstores in both areas equally. Their second contention poses more problems. The ordinances prohibit adult movie theaters in local retail areas but permit them subject to certain restrictions in general retail areas. They argue there is no factual basis for the disparate treatment.

The United States Supreme Court has addressed constitutional challenges of a similar Detroit anti-clustering ordinance. *Young v. American Mini Theatres, Inc.* (1976), 427 U.S. 50. Therein the Court addressed First Amendment and Equal Protection issues raised by such ordinances. The Court did not reach the constitutional issues raised by the appellant here.

The trial court did not conduct a trial *de novo* on these constitutional issues. These issues were not raised before nor addressed by the Zoning Board of Appeals since an administrative body lacks authority to determine, the constitutionality of a zoning ordinance. *FRC of Kamms Corner v. Cleveland Bd. of Zoning Appeals* (1984), 14 Ohio App.3d 372. However, a constitutional issue may be raised for the first time on appeal to the Common Pleas Court in a R.C. 2506 proceeding. *State ex rel. Sibarco v. City of Berea* (1966), 7 Ohio St.2d 85; *cert. denied* (1967), 386 U.S. 957. This Court has determined that issues of constitutionality of zoning restrictions must be tried origin-

ally in the Court of Common Pleas. *SMC, Inc. v. Laudi* (1975), 44 Ohio App.2d 325; *Marquette Steel Company v. Cleveland Bd. of Zoning Appeals* (Jan. 3, 1985), Cuyahoga App. No. 48397, unreported; *McCreery v. Brecksville, Bd. of Zoning Appeals* (Dec. 27, 1984), Cuyahoga App. No. 48396, unreported. We conclude that these issues should have been tried originally in the trial court as scheduled; therefore, the assignments have merit. It was error to deny the appellants an opportunity to present further evidence on the constitutional issues raised rather than summarily dismissing the appeal without a hearing.

III.

In its third assignment of error, Brookpark News contends that in the alternative the Board should have granted a variance to permit its use. The Ohio Supreme Court in *Consolidated Management, Inc. v. City of Cleveland* (1983), 6 Ohio St.3d 238, outlined the three requirements essential for granting a variance. The Court stated:

It is necessary that the board of zoning appeals read, and apply, each subsection of Ordinance Section 329.03 *in pari materia*. Accordingly, in order for the board to grant a specific variance, subsections 329.03 (b)(1), (2) and (3) require that each applicant prove that the zoning classification presents an unnecessary hardship or practical difficulty to the intended use of the property; that refusal of the variance will deprive the owner of substantial property rights; and that the granting of the variance would not be contrary to the intent of the zoning code. [Footnote omitted.]

Id. at 242. The Court in that case specifically found that where the property owner acquired an interest in the prem-

sies with knowledge of the zoning restrictions, he has created his own hardship and cannot thereafter apply for a zoning variance based on such hardship. See also, *Reed v. Rootstown Twp. Bd. of Zoning Appeals* (1984), 9 Ohio St.3d 54. Given the fact that here the appellant entered into a long term lease with knowledge of the zoning restrictions, the appellant has failed to carry its burden of proof in establishing hardship. Furthermore, given the express intent of the anti-clustering provisions the granting of a variance would be directly contrary to the intent of the zoning code. This assignment is overruled.

Although this court from a review of the record made before the Board and the arguments advanced in the briefs might be inclined to rule in favor of the City, we nevertheless are compelled to reverse and remand this case to the trial court. For reasons unknown, the obvious error of the trial court in entering judgment before the scheduled hearing was conducted was not challenged nor called to the trial judge's attention by counsel for either side. No motion seeking clarification, no motion for a new trial, and no request for findings of facts and conclusions of law were ever sought.

For the reasons detailed in Section II of this opinion, the judgment of the trial court is reversed and remanded for a hearing on the constitutional issues raised by the appellant's appeal.

This cause is reversed and remanded for further proceedings consistent with this Journal Entry and Opinion.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NAHRA, *P.J.*, and
KRUPANSKY, *J.*, concur.

/s/ JOHN V. CORRIGAN
Judge

ORIGINAL PERMIT REVOCATION NOTICE
CITY OF CLEVELAND

January 3, 1984

Mr. Joseph Wade
31400 Lorain Ave.
North Olmsted, Ohio 44126

Re: 16700 Brookpark Rd.
Permit M-103443

Dear Mr. Wade,

We are hereby revoking permit M-103443 issued December 2, 1983.

An inspection of premises [sic] a [sic] 16700 Brookpark Rd. on January 1, 1984 at 2:30 p.m. by Inspector John Capko, indicated that this building is being used for the sale an [sic] presentation of materials characterized by an emphasis on "specified sexual activities" as defined in Section 343.11 of the City's Zoning Code. Said use is not authorized within 1000 feet of an adult bookstore and mini-motion picture theatre, in a General Retail Zone.

This permit is being revoked under Section 3103.07 of the Codified Ordinances of the City of Cleveland. You are cautioned to discontinue the present use of this building at once.

Very Truly Yours

/s/ A. CULTRONA

A. Cultrona

Ass't. Administrator

AC/dmc

CC Dennis Hadick

5530 State Rd. Parma, Ohio 44129

Clarence Rogers, Attorney

614 Superior Bldg. Cleveland, Ohio 44113

Inspector J. Capko

REINSTATEMENT OF ORIGINAL USE PERMIT

CLEVELAND BOARD OF ZONING APPEALS

519 City Hall Cleveland, Ohio 44114 216/664-2580

February 21, 1984

Anthony Costanzo

Secretary

Michael Gaeta

Zoning Engineer

CALENDAR NO. 84-3

16700 Brookpark Road

RESOLUTION

WHEREAS, Joseph Wade, owner, and Brookpark News & Books Incorporated c/o Joel Kamensky, tenant, appeals under Section 329.01(e) and Section 329.02(d) of the Codified Ordinances from the revocation on January 3, 1984 of Permit M-103443 issued on December 2, 1983 for premises at 16700 Brookpark Road by the Commissioner of Building and Housing.

WHEREAS, this property is located on the north side of Brookpark Road, approximately 3000' west of West 150th Street.

WHEREAS, after public notice and written notice mailed to ten directly affected property owners, a public hearing was held February 13, 1984.

WHEREAS, after due consideration of the testimony submitted at the said hearing, the Board finds that the appeal should be granted for the reason that the evidence presented establishes that the permit, M103443, was issued on December 2, 1983 and was issued to make alterations and to convert the building to a book store; that upon completion of the alterations the Building Division issued

a Certificate of Occupancy, which authorizes the use of the building for the purpose as indicated in the initial permit application; that subsequently the Building Division determined that the operation went beyond the scope of the initial permit; to wit: a *book store*, an *adult book store*, and an *adult mini-motion picture theater*; that at that point the Building Division voided the abovementioned permit; that a *book store* is a permitted use in the building, which position is not contested by the Building Division, and that the Building Division has an adequate remedy through criminal prosecution to remedy the alleged wrongful uses of the building; now therefore,

BE IT RESOLVED that the the decision of the Commissioner of Buildings heretofore rendered in the within matter be and the same is hereby reversed and the appeal is granted.

Yea: Cade, Chatman, Palmer

Nay: Jablonski, Schwonek

Approved and adopted by the Board of Appeals

/s/ **ANTHONY COSTANZO**
Anthony Costanzo, Secretary
BOARD OF APPEALS

AC:lm

REQUEST FOR CHANGE OF USE

OFFICIAL NOTICE

(Note: To Tenant or Janitor — This notice should be forwarded without delay to the owner of the property)

**CITY OF CLEVELAND
BOARD OF ZONING APPEALS
Meeting in Room 210, City Hall**

Telephone: 664-2580
January 31, 1984

To the Property Owner:

You are hereby officially notified that the case stated below will be heard before the Board of Appeals, in Room 210, City Hall, at a public hearing at 9:30 A.M.

Monday, February 13, 1984

Calendar No. 83-359:

Appellant Joseph Wade, owner, and Brookpark News & Books Incorporated, Joel Kamensky, tenant

Premises located at 16700 Brookpark Road, S. W.

Permission is asked to convert to an adult book store and adult mini-motion picture theatre the 42' x 73' one-story masonry irregular shaped store building on a 142' x 255' lot located in a General Retail District at 16700 Brookpark Road, said conversion being contrary to the provisions of Sections 343.01 and 343.11 of the Codified Ordinances.

The owner of the above property appeals for a modification of the decision of the Commission of Building as stated above.

IF THE BUILDING PROPOSED TO BE ERECTED OR THE PROPOSED USE IS THOUGHT BY YOU TO BE INJURIOUS TO YOUR PREMISES, YOU WILL HAVE AN OPPORTUNITY TO EXPRESS YOUR OBJECTIONS IN DETAIL AT THE ABOVE SPECIFIED TIME AND PLACE.

If it is inconvenient for you to appear personally at the hearing, or to have a representative present, file your objection by letter, giving the address of the property owned by you, and stating your objections.

Anthony Costanzo
Secretary
Room 519, City Hall

AC:jrf

ORIGINAL CHANGE OF USE PERMIT (16500)

[x] Building Housing

Permit No. M 66107

Plant No.

CITY OF CLEVELAND
DEPARTMENT OF COMMUNITY DEVELOPMENT
DIVISION OF BUILDING

July 12, 1978

**IN PURSUANCE OF THE FILING OF THE REQUIRED
APPLICATION THERE IS HEREBY ISSUED TO:**

**CLASSIC BUILDING SYSTEMS
5361 PEARL RD.**

**REGISTERED CONTRACTOR
on behalf of**

16500 CORP.
16500 Brookpark

OWNER of Property known as

LOCATION: 16500 BROOKPARK RD SUB LOT

[Paid Jul 13 1978
City of Cleveland
Alan (Illegible)]

PERMISSION IS HEREBY GRANTED TO:

**USE PERMIT
CHANGE USE FROM USED CAR SALES OFFICES
TO BOOK STORE.**

PURSUANT TO SECTION 5.0501 OF THE CODIFIED ORDINANCES OF THE CITY OF CLEVELAND, NO NEW BUILDING SHALL BE OCCUPIED UNTIL A CERTIFICATE OF OCCUPANCY HAS BEEN ISSUED.

SET BACK:

The work or use authorized by this permit must be started on or before USE PERMIT and the work authorized completed on or before

PERMIT

The issuance of this permit is for the use or work specified in the application filed therefore and any unauthorized change or alteration from the aforesaid application or plans will render this permit null and void.

Separate permits must be secured for Plumbing, Wiring, Heating, Elevators, Air Conditioning etc. by Registered or Licensed Contractors ONLY.

THIS PERMIT CONVEYS NO RIGHT TO USE OR OCCUPY ANY STREET, OR SIDEWALK OR PART THEREOF, EITHER TEMPORARILY OR PERMANENTLY.

*Keep this Permit Conspicuously Posted on the
Above premises at all times.*

**CARLETON RUSH
COMMISSIONER**

CHANGE OF USE PERMIT

[x] Building Housing

Permit No. M 1034 18

Plan No. Inappl.

CITY OF CLEVELAND

DEPARTMENT OF COMMUNITY DEVELOPMENT
DIVISION OF BUILDING

**IN PURSUANCE OF THE FILING OF THE REQUIRED
APPLICATION THERE IS HEREBY ISSUED TO:**

SOUTH SHORE, INC.
4175 JENNINGS RD.

REGISTERED CONTRACTOR
on behalf of

RAY SLOAN
16500 BROOKPARK RD.

OWNER of property known as

LOCATION: 16500 BROOKPARK SUB LOT
C.T. 1238

PERMISSION IS HEREBY GRANTED TO:

CHANGE OF USE

FROM BOOK STORE TO BOOK STORE, ADULT BOOK STORE AND ADULT COIN MINI MOVIES AND ITEMS, NEW INTERIOR PARTITIONS FOR MACHINES, SEPARATE PERMITS REQUIRED FOR ALL ELECTRICAL WORK.

PURSUANT TO SECTION 5.0501 OF THE CODIFIED ORDINANCES OF THE CITY OF CLEVELAND, NO NEW BUILDING SHALL BE OCCUPIED UNTIL A CERTIFICATE OF OCCUPANCY HAS BEEN ISSUED.

SET BACK:

The work or use authorized by this permit must be started on or before 30 MAY 1984 and the work authorized completed on or before

PERMIT

The issuance of this permit is for the use or work specified in the application filed therefore and any unauthorized change or alteration from the aforesaid application or plans will render this permit null and void.

Separate permits must be secured for Plumbing, Wiring, Heating, Elevators, Air Conditioning etc. by Registered or Licensed Contractors ONLY.

THIS PERMIT CONVEYS NO RIGHT TO USE OR OCCUPY ANY STREET, OR SIDEWALK OR PART THEREOF, EITHER TEMPORARILY OR PERMANENTLY.

*Keep this Permit Conspicuously Posted on the
Above premises at all times.*

CHARLES L. SHEBOY
COMMISSIONER

ORDER VOIDING CHANGE OF USE PERMIT

CITY OF CLEVELAND

GEORGE V. VOINOVICH, MAYOR

BOARD OF BUILDING STANDARDS: BUILDING APPEALS

Room 15 - City Hall
Cleveland, Ohio 44114
(216) 664-2418 - 664-2419

RESOLUTION

[Adopted Mar 21 1984
Board of Building Standards
and Building Appeals]

March 14, 1984

Docket A-7-84

Appellant: 16500 Corporation
Mailing address: 1300 Rockefeller Building; Cleveland,
Ohio
Property at: 16500 Brookpark Road; Cleveland, Ohio
Subject: Change of Use Permit

THE RESOLUTION:

WHEREAS, 16500 Corporation, lessee of the Property, located on the premises known as 16500 Brookpark Road, appealed to the Board of Building Standards and Building Appeals from an order of the Commissioner of the Division of Building and Housing dated November 30, 1983, requiring compliance with the Codified Ordinances, and

WHEREAS, 16500 Corporation appealed to the Board of Building Standards and Building Appeals for variance consideration from the subject order, and

WHEREAS, the Board of Building Standards and Building Appeals held public hearings on February 29th, March 7th and March 14th - 1984 in Room 15 in City Hall, at which times Clarence D. Rogers, Attorney for the Appellant (Lessee), and the Commissioner of the Division of Building and Housing were afforded the opportunity and did discuss all the points at issue, and

WHEREAS, the Board of Building Standards and Building Appeals reviewed the Appeal Statement and Exhibit "A", Change of Use of Permit No. M 1034 18; reviewed applicable Code Sections pertaining to said subject; heard sworn testimony from all interested persons in attendance regarding said issue, now therefore

BE IT RESOLVED, in reviewing the facts in the case, and if the lease is adjudged valid, a motion is in order at this time to find that the 16500 Corporation was doing business as the owner as defined in Section 3101.05 of the Cleveland Building Code, where "Owner" is defined as "the owner or owners of the premises, a vendee in possession, a mortgagee or receiver in possession, a lessee or joint lessees of the whole thereof, or an agent or any other person, firm or corporation directly in control of the premises." This definition in the opinion of the Board makes the 16500 Corporation the owner of record at the time of issuance of what is determined by the Board as a wrongful permit to the South Shore Corporation representing the owner of the title to the property; therefore, the permit issued to South Shore, Inc. on behalf of Ray Sloan dated 30th November 1983 should be revoked. Motion so in order. Motioned by Mr. Schmidt and seconded by Mr. Pastirik.

* * *

Approved and Adopted by the Board of Building Standards
and Building Appeals Wednesday, March 21, 1984, subject
to the Codified Ordinances of the City of Cleveland.

Yea: Messrs. Denk, Pastirik, Schmidt, Bowes

Nay: None

Abstained: Mr. Pinzone

/s/ **FRANK F. EPPOLITO**
Frank F. Eppolito
Executive Secretary

**ORDER DENYING APPEAL OF PERMIT
FOR 16700 ADDRESS**

CLEVELAND BOARD OF ZONING APPEALS

519 City Hall Cleveland, Ohio 44114 216/664-2580

ANTHONY COSTANZO

Secretary

MICHAEL GAETA

Zoning Engineer

February 21, 1984

CALENDAR NO. 83-359

16700 Brookpark Road **RESOLUTION**

WHEREAS, Joseph Wade, owner, and Brookpark News & Books Incorporated c/o Joel Kamensky, tenant, appealed from the decision of the Commissioner of Buildings for permission to convert to an adult book store and adult mini-motion picture theatre the 42' x 73' one-story masonry irregular shaped store building on a 150' x 375' lot located in a General Retail District at 16700 Brookpark Road, said conversion being contrary to the provisions of Sections 343.01 and 343.11 of the Codified Ordinances.

WHEREAS, this property is located on the north side of Brookpark Road, approximately 3000' west of West 150th Street.

WHEREAS, after public notice and written notice mailed to ten directly affected property owners, a public hearing was held February 13, 1984.

WHEREAS, after due consideration of the testimony submitted at the said hearing, the Board finds that the appeal should be refused for the following reasons:

1. The evidence establishes that the property has been located in a General Retail District since 1967; that in 1978 the building was constructed as a restaurant; that in 1981 the building was converted

to a massage parlor; that the property to the east at 16500 Brookpark has located thereon two buildings, one of which is classified as an adult book store and the other as an adult mini-motion picture theater; that the property at 16500 is located in a General Industry District which is not subject to the restrictions relating to adult book stores or adult mini-motion picture theaters; that the Code states that no mini-motion picture theater may be placed in a General Retail District if it is located within 1000' of an adult book store; that the proposed use would be within 280' to 300' of the adult book store at 16500.

2. No exceptional local condition exists in this vicinity to justify the Board in amking [sic] the variance requested.
3. Granting the appeal would be detrimental to the general welfare of the neighbors and to the value of their properties and would be contrary to the intent and purpose of the zoning ordinances.
4. In being refused this appeal, the owner will not suffer an unreasonable hardship since he is not denied any use of property not also denied other owners in that district similarly situated; now therefore,

BE IT RESOLVED that the decision of the Commissioner of Buildings heretofore rendered in the within matter be and the same is hereby sustained and the appeal is refused.

Yea: Jablonski, Schwonek, Palmer

Nays: Cade, Chatman

Approved and adopted by the Board of Zoning Appeals

/s/ **ANTHONY COSTANZO**

Anthony Costanzo, Secretary

BOARD OF ZONING APPEALS

AC:lm

**NOTICE OF VIOLATION OF BUILDING
ORDINANCES (16700)**

CITY OF CLEVELAND

**DEPARTMENT OF COMMUNITY DEVELOPMENT
DIVISION OF BUILDING**

Room 505 City Hall

**FOR YOUR PROTECTION
USE**

**REGISTERED CONTRACTOR
ONLY**

File No. 81599

NOTICE OF VIOLATION OF BUILDING ORDINANCES

Location 16700 Brookpark Road Date January 3, 1984

Contractor

Address

Marie & Joseph Wade

Owner c/o Wade Sales Corp.
10 Saranac Road

Address Sea Ranch Lake, Fla. 33308

Atty. Irving A. Ryan, Atty.
Address 285 E. Bagley Rd. Berea, Oh 44017

Atty. Clarence Rogers, Atty.
Address 614 Superior Ave. City 44113

Kind of Structure 1-St. Masonry II-B

Zoning: General Retail Permit No. M-102047

SECTION No.	VIOLATED	NATURE OF VIOLATIONS	UNAUTHORIZED USE
<p>An inspection of the above-addressed premises on 12/29 & 31/83 disclosed violation of the listed sections of the Codified Ordinances of the City of Cleveland, and you are therefor directed to comply as specified below:</p>			
343.11		Discontinue the use of an adult book store and mini motion picture theater located at 16700 Brookpark Road; that is less than one thousand, (1,000 ft.), feet from another book store and an adult mini motion picture theater.	
3113.05		Remove unauthorized signs on the face of the building.	
327.99		Subject to penalty for violation of the Zoning Code.	
3103.99		Subject to penalty for violation of the Building Code.	
329.02		Provides the right of appeal to the Board of Zoning Appeals.	
3103.18		Provides the right of appeal to the Board of Building Standards & Appeals.	

ORIGINAL CITY ORDINANCE 343.01

CLERK OF COUNCIL

THE FOLLOWING ORDINANCE WAS PASSED BY THE COUNCIL OF THE CITY OF CLEVELAND APRIL 14, 1979

* * * * *

Section 343.01. Local Retail Business District.

(a) Definition.

For the purposes of this Chapter a Local Retail District is defined as a business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only.

(b) For the purpose of this chapter "Adult Book Store" is defined as follows:

An establishment having as a substantial and significant portion of its stock in trade. Books, Magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) or an establishment with a segment or section devoted to the sale or display of such material.

For the purpose of this Section "Specified Sexual Activities" is defined as:

1. Human Genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or another erotic touching of human genitals, pubic region, buttock or female breast.

And "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(c) Permitted Buildings and Uses.

The following buildings and uses are permitted in a Local Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged, or designed to be used, in whole or in part for other than one or more of the following specified uses, and there shall be no display of goods in front of a setback building line.

* * * * *

2. Retail Business for local or neighborhood needs to the following limited extent:

* * * * *

2e. The sale of books, magazines, newspapers, cigars, drugs, flowers, gifts, music, photographic goods, sporting goods, stationery, provided however, that not more than two Adult Book Stores shall be within one thousand feet of each other. "Nor shall such Adult Book Stores be within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, not within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. * * *

* * * * *

Section 343.11. General Retail Business District.

* * * * *

(b) Permitted Buildings and Uses.

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged, or designed to be used, in whole or in part for other than one or more of the following specified uses:

1. Except as otherwise provided in this Chapter, all uses permitted and as regulated in any Local Retail Business District.
2. All Retail Business uses and buildings specified in Section 343.01 (b), and uses and buildings to provide for:

* * * * *

21. * * * that not more than two of the following uses shall be within one thousand feet of each other:

1. Adult Motion Picture Theatre.
2. Adult Mini Motion Picture Theatre.
3. Pool or Billiard Halls.
4. Premises having as their main or primary use pinball machines.

Provided further that the use as specified in 1 through 4 inclusive of this subsection shall not be within 1,000 ft. of any Adult Book Store as set forth in Section 343.01; nor within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. * * *

* * * * *

I, Mercedes Cotner, Clerk of Council of the City of Cleveland, do hereby certify that the foregoing is a true and correct copy of Ordinance No. 431-75, passed by the Council of the City of Cleveland, April 19, 1979, effective April 24, 1979

WITNESS my hand and seal at Cleveland, Ohio, this 14th day of August, 1984

/s/ MERCEDES COTNER
Clerk of Council

**CITY ORDINANCES AS PRINTED IN CITY'S
"MANUAL" OR "HANDBOOK"**

343.01 Local Retail Business District.

(a) *Definitions.* For the purposes of this chapter, certain terms are defined as follows:

(1) "Local Retail District" means a business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only.

(2) "Adult Book Store" means an establishment having as a substantial and significant portion of its stock in trade in books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas", (as defined below) or an establishment with a segment or section devoted to the sale or display of such material.

(3) "Specified sexual activities" means:

A. Human genitals in a state of sexual stimulation or arousal;

B. Acts of human masturbation, sexual intercourse or sodomy;

C. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

(4) "Specified anatomical areas" means:

A. less than completely and opaquely covered: (1.) human genitals, pubic region, (2.) buttock, and (3.) female breast below a point immediately above the top of the areola; and

B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a Local Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses, and there shall be no display of goods in front of a setback building line.

* * * * *

(2) Retail business for local or neighborhood needs to the following limited extent:

* * * * *

E. The sale of books, magazines, newspapers, cigars, drugs, flowers, gifts, music, photographic goods, sporting goods, stationery, provided however, that not more than two adult book stores shall be within 1,000 feet of each store. Nor shall such adult book stores be within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy,

nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. * * *

* * * * *

343.11 General Retail Business Districts.

* * * * *

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses:

(1) Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in any Local Retail Business District.

(2) All retail business uses and buildings specified in Section 343.01 (b), and uses and buildings to provide for:

* * * * *

L. * * * that not more than two of the following uses shall be within 1,000 feet of each other:

1. Adult motion picture theatre.
2. Adult mini motion picture theatre.
3. Pool or billiard halls.
4. Premises having as their main or primary use pin-ball machines.

Provided further that the use as specified in subsection L. 1. through 4. inclusive of this subsection shall not be within 1,000 ft. of any adult book store as set forth

in Section 343.01; nor within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. * * *

* * * * *

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646 § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590.)

OHIO CONSTITUTION

ARTICLE I

§ 11 [Freedom of speech and of the press; libel.]

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted. (See Const 1802, Art VIII, § 6.)

OHIO REVISED CODE

§ 2506.04 Finding and order of court.

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code.

NO. 86-963

Supreme Court, U.S.
FILED

JAN 5 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

BROOKPARK NEWS & BOOKS, INC., ET AL.,

Petitioners,

-VS-

CITY OF CLEVELAND, ET AL.,

Respondents

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court of the United States review, pursuant to Rule 17, factual disputes decided by the Courts of the State of Ohio and non-litigated constitutional questions which were remanded by the Court of Appeals to the trial court for a de novo hearing.
2. Should the Supreme Court grant certiorari where the Petitioner is requesting what the State Court of Appeals has already granted by way of remand for trial, namely, a review of the facts underlying the claim of constitutional deprivations.

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NO. 86-963

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

BROOKPARK NEWS & BOOKS, INC., ET AL.,

Petitioners,

-vs-

CITY OF CLEVELAND, ET AL.,

Respondents

STATEMENT OF THE CASE

The within appeal arose from an application for change of use from a

"bookstore" to a "bookstore and mini-motion picture theater", the denial thereof, and a subsequent appeal to the Board of Zoning Appeals (hereinafter "Board") of the City of Cleveland.

The use variance was denied by Resolution of the Board and Petitioner, Brookpark News & Books Inc. (hereinafter "Brookpark"), filed its Administrative Appeal to the Court of Common Pleas, pursuant to Ch. 2506, Ohio Revised Code.

The Court of Common Pleas affirmed the decision of the Board, and thereafter an appeal was filed with the Court of Appeals for the Eighth Judicial District (Cuyahoga County), which affirmed the trial court on zoning and spacing claims but remanded for a trial de novo on the constitutional issues. (Appendix A-2).

Thereafter, Petitioners filed a Notice of Appeal requesting the Ohio Supreme Court to certify the Record and, on September 10, 1986, the Supreme Court of Ohio overruled the Petitioners' Motion to Certify the Record (See A-1).

From the decision of the Ohio Supreme Court denying jurisdiction, Petitioners filed the within Petition for a Writ of Certiorari.

STATEMENT OF FACTS

Brookpark, on December 2, 1983, received use permit No. M-103443 for use of the premises at 16700 Brookpark" . . . for retail sales of new[s] and books . . ." (Appendix A-13), a permitted use in the General Retail District.

On December 28, 1983 an application was made by Brookpark for a permit to change the "use from news and books to Adult bookstore and adult mini-motion picture." (A-3 in Appendix). On December 28, 1983, the permit request was denied because the adult mini-motion picture theater was within 1,000 ft. of an existing adult bookstore as defined in the Zoning Code, and thus was prohibited by Section 343.11(b)(L) of the Zoning Code.

Brookpark, however, without a permit for such use, and with a permit

only for sales of news and books, had commenced operating the mini-motion picture theater and adult bookstore. Permit M-103443 was then cancelled on January 3, 1984 because Brookpark's premises were being used for a mini-motion picture theater and adult bookstore in violation of Section 343.11(b)(L), in that it was within 1,000 ft. of an adult bookstore and mini-motion picture theater.

Located to the east of 16700 Brookpark are an adult bookstore and mini-motion picture theater located, respectively, 280 feet from the 16500 Brookpark address and the other 300 feet from the subject structure.

Thereafter, Brookpark appealed to the Board to convert the use at the subject premises to an adult bookstore and adult mini-motion picture theater; after

hearing, the appeal was denied by Decision and Order of the Board (Appendix A-15).

Brookpark thereafter filed an administrative appeal with the Court of Common Pleas claiming that the action of the Board was contrary to law and not supported by the evidence and further, that Zoning Code Section 343.11(b)(L) was unconstitutional for vagueness and for discriminating against theaters. After reviewing all the facts in the Record before it, but without holding a trial de novo, the Court sustained the Decision and Order of the Board.

A further appeal to the Court of Appeals followed. The Court of Appeals, after reviewing the facts, upheld the spacing requirements but reversed and remanded for trial as to the constitutional issues raised by

Petitioners. Because of Petitioners' subsequent appeal to the Ohio Supreme Court and instant Petition for Writ of Certiorari, that trial has not been held.

I. PETITIONERS HAVE ALREADY OBTAINED ALL THE RELIEF SOUGHT IN ITS PETITION, IN THAT THE CONSTITUTIONAL CLAIMS RAISED HEREIN WERE CONSIDERED BY THE OHIO COURT OF APPEALS, WHICH ORDERED THE CASE REMANDED TO THE TRIAL COURT FOR DETERMINATION AS TO ALL CONSTITUTIONAL ALLEGATIONS.

Throughout the Petition for Writ of Certiorari, Petitioners consistently claim their constitutional rights were violated and consequently request this Court to relitigate factual disputes which were resolved by the Courts below and the Board.

However, Petitioners fail to direct this Court to the remand order of the Ohio Court of Appeals on the constitutional issues before it. Those issues, which the Ohio Court of Appeals found had not been

decided by the trial court, were substantially identical to these raised in the instant Petition for Writ of Certiorari.

In its decision the Ohio Court of Appeals specifically refers to the constitutional issues now raised by Petitioners. That opinion states categorically at A-8-9 of the Appendix:

The appellant's second and fourth assignments will be addressed together as they present related issues. The appellant's briefs filed in the trial court presented two constitutional issues. First, it argued that the ordinances did not specify whether the spacing restrictions apply when there are two existing regulated uses

within 1,000 feet but which are in an adjacent but differently zoned area. Thus, the appellant argued that the ordinances are unconstitutionally vague in that they fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

Papachristou v. City of Jacksonville (1972), 405 U.S. 156; United States v. Harriss (1953), 347 U.S. 612. * * *

Their second contention is that, under the ordinances, adult bookstores receive more favored treatment than do theaters.

Their second contention poses more problems. The ordinances prohibit adult movie theaters in

local retail areas but permit them subject to certain restriction in general retail areas. They argue there is no factual basis for the disparate treatment.

In remanding for trial, as to Petitioners' constitutional claims, the Court of Appeals stated, at A-9 of the Appendix:

This Court has determined that issues of constitutionality of zoning restrictions must be tried originally in the Court of Common Pleas. SMC, Inc. v. Laudi (1975), 44 Ohio App. 2d 325; Marquette Steel Company v. Cleveland Bd. of Zoning Appeals (Jan. 3, 1985), Cuyahoga App. No. 48397, unreported; McCreery v.

Brecksville, Bd. of Zoning Appeals

(Dec. 27, 1984), Cuyahoga App. No. 48396, unreported. We conclude that these issues should have been tried originally in the trial court as scheduled; therefore, the assignments have merit. It was error to deny the appellants an opportunity to present further evidence on the constitutional issues raised rather than summarily dismissing the appeal without a hearing.

The Court concluded, at Appendix A-12:

For the reasons detailed in Section II of this opinion, the judgment of the trial court is reversed and remanded for a hearing on the constitutional issues raised by the appellant's appeal.

Thus, Petitioners in effect are praying for precisely the relief that the Ohio Court of Appeals already has granted - remand for trial on their constitutional claims.

II. PETITIONERS WOULD HAVE THIS COURT RECONSIDER FACTUAL DETERMINATIONS PREVIOUSLY MADE BY THE BOARD OF ZONING APPEALS AND THE OHIO COURTS.

In their Argument, Petitioners once again raised factual issues, such as the use permit cancellation for the adjacent bookstore, which were squarely before the Ohio Courts and which were determined by the Ohio Courts.

This particular factual issue was squarely decided by the Ohio Court of Appeals at A-8 of the Appendix, wherein the court, having reviewed the entire

Record before it, found that:

The evidence herein established that the 16500 Brookpark lot had two buildings on it, one housing an adult mini-movie theater and the other housing a bookstore. On November 30, 1983, the City issued a permit changing the use of that establishment from a bookstore to an adult bookstore. This permit was outstanding at the time the appellant applied for a permit at 16700 Brookpark. The appellant insists that the operation of an adult bookstore at 16500 Brookpark had ceased and therefore that permit should not bar the issuance of a permit for 16700 Brookpark. The fact remains that outstanding permits existed for two of the

regulated uses at the time of the appellant's application. The issuance of a third permit would have been in direct contravention of the City Ordinances. This assignment is overruled.

It is, of course, the province of the trial courts to consider the evidence before it and to determine the credibility and the weight to be given it. Nevertheless, Petitioners would have this Court review specifically that decision of the trial Court, which already has been affirmed by the Ohio Court of Appeals and further subject to review by the Ohio Supreme Court. The basis for Petitioners' attack is the claim that they had ceased to operate the adult bookstore at 16500 Brookpark Road at the time of the application for a permit for 16700 Brookpark. As the opinion of the Ohio

Court of Appeals makes abundantly clear, this Court was aware of that fact, but found more persuasive the uncontroverted fact that Petitioners continued to maintain their permit to operate the 16500 adult bookstore, which the court found would have made "issuance of a third permit . . . in direct contravention of the City Ordinances."

The determination of the Board of Zoning Appeals and of the Ohio Courts was based upon a full review of all the competent, credible evidence submitted. Petitioners thus would have this Court substitute their own evaluation of that evidence for the decisions below, and would cast this Court in the role of a Super Board of Zoning Appeals. The record fully supports the determination of the Ohio Court of Appeals, and the Ohio

Supreme Court as to those factual matters before them.

CONCLUSION

From a careful reading of the Petition it is clear that Petitioners would have this Court again consider factual issues already decided by the courts below and the Board of zoning Appeals.

Also, the Petition meets none of the jurisdictional requirements of Rule 17 of the Supreme Court Rules.

Therefore, for all the foregoing reasons, this Court should deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing Brief In Opposition have been served upon the following parties and/or counsel of record, by U.S. mail, postage prepaid

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APPENDIX

**ORDER OF SUPREME COURT OF OHIO
DISMISSING APPEAL**

(Dated September 10, 1986)

Case No. 86-1195

THE SUPREME COURT OF OHIO
COLUMBUS

BROOKPARK NEWS & BOOKS, INC., *et al.*,
Appellants,

v.

CITY OF CLEVELAND, *et al.*,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by Rogers, Horton, Forbes & Teamor.

/s/ **FRANK D. CELEBREZZE**
Chief Justice

**JOURNAL ENTRY AND OPINION OF THE COURT
OF APPEALS FOR CUYAHOGA COUNTY**

(Decided May 22, 1986)

No. 50651

**COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA**

BROOKPARK NEWS & BOOKS, INC. *et al.*

Plaintiff-Appellants,

vs.

CITY OF CLEVELAND, *et al.*,

Defendant-Appellees.

**JOURNAL ENTRY AND OPINION
CHARACTER OF PROCEEDINGS:**

**CIVIL APPEAL FROM THE
COMMON PLEAS COURT
CASE NO. 071,205**

JUDGMENT:

REVERSED AND REMANDED

CORRIGAN, J.:

This appeal arose from an application for a change of use from a bookstore to an adult bookstore and a motion picture theater, the denial thereof, and a subsequent appeal to the Board of Zoning Appeals. The use variance was denied by a resolution of the Board and the appellant took an appeal to the Common Pleas Court pur-

suant to R.C. 2506. The Common Pleas Court affirmed and the appellant raises four assignments for our review:

- I. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS CONTRARY TO LAW.
- II. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS UNCONSTITUTIONAL, ARBITRARY, CAPRICIOUS AND UNREASONABLE.
- III. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS UNSUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL RELIABLE AND PROBATIVE EVIDENCE.
- IV. THE TRIAL COURT ERRED IN NOT CONDUCTING A TRIAL DE NOVO OF APPELLANTS' REQUEST FOR A VARIANCE AND PERMIT FOR THE REASONS THAT APPELLANTS RAISED CONSTITUTIONAL ISSUES IN THEIR APPEAL FROM THE DECISION OF THE BOARD OF ZONING APPEALS.

On December 2, 1983, Brookpark News & Books, Inc. received a use permit for the retail sales of new[s] and books at 16700 Brookpark. On December 28, 1983 an application was made by Brookpark News & Books to change the use to an adult bookstore and an adult mini-motion picture theater. The request was denied on the basis that the operation was within 1000 feet of an existing adult bookstore and a mini-motion picture theater both

located at 16500 Brookpark. Those operations were housed in separate buildings on that lot. The proposed use was located within 280 feet of the existing bookstore and 300 feet from the mini-motion picture theater. An appeal was filed with the Board of Zoning Appeals which was denied. That decision was affirmed by the Common Pleas Court and Brookpark News brought this appeal.

I.

In its first assignment of error, the appellant contends that the trial court erred in affirming the Board of Zoning Appeals' decision as it was contrary to law. Since the resolution of this assignment as well as the second assignment hinges upon an interpretation of provisions of the City of Cleveland Zoning Code, the requirements of the Code will be discussed in some detail.

Chapter 343 of the Cleveland Zoning Code governs the permitted buildings and uses for the various types of districts within the confines of Cleveland. A portion of Chapter 343 addresses specifically the permitted uses of adult movie theaters and bookstores. Those sections contain anti-clustering provisions which attempt to prevent the concentration of adult movie theaters and adult bookstores in various areas throughout the City of Cleveland. The express purpose was to control certain adverse effects in the neighborhoods in which such businesses are situated which tend to contribute to the blighting and downgrading of surrounding neighborhoods, causing surrounding neighborhoods to give the appearance of decline, both economically and residentially. To achieve that end the Code imposes certain spacing requirements on these uses as a direct attempt to prevent the clustering of adult theaters and bookstores and the accompanying debilitating effect on the surrounding areas.

Section 343.01 outlines permitted uses in local retail districts defined as follows:

(1) "Local Retail District" means a business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only.

The Code then lists the permitted uses in such districts. In pertinent part it provides in Section 343.01(B)(2)(E):

E. The sale of books, magazines, newspapers, cigars, drugs, flowers, gifts, music, photographic goods, sporting goods, stationery, provided however, that not more than two adult book stores shall be within 1,000 feet of each other. Nor shall such adult book stores be within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976.

Thus, subject to the spacing restrictions, adult movie theaters are permitted in local retail business districts. Section 343.11 defines general retail business districts as follows:

343.11 General Retail Business Districts.

(a) *Definitions.* For the purposes of this chapter, certain terms are defined as follows:

(1) "General retail business" means an enterprise for profit for the convenience and service of, and dealing directly with, and accessible to, the ultimate consumer; neither injurious to adjacent premises

or to the occupants thereof by reason of the emission of cinders, dust, fumes, noise, odors, refuse matter, smoke, vapor or vibrations; nor dangerous to life or property. It includes buildings or spaces necessary to a permitted use for making or storing articles to be sold at retail on the premises. Except as provided in subsection (b) hereof, it does not include any establishment which supplies a retail outlet other than that on the premises, or any building or use specifically mentioned as permitted only in a Semi-Industry or Industry District.

The property at issue here is located in a general retail business district. Section 343.11(b) outlines permitted uses in such areas as follows:

(b) Permitted Buildings and Uses.

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses:

(1) Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in any Local Retail Business District.

*(2) All retail business uses and buildings specified in Section 343.01 (b), and uses and buildings to provide for: * * *. [Emphasis added.]*

Thus, uses permitted in local retail areas are also permitted in general retail subject to the same restrictions. Section 343.11(b) goes on to outline additional permitted uses including the permitted use of adult movie

theaters which are not permitted in local retail areas. That section, 343.11(b)(2)(L), provides:

L. Amusement and recreation: armory, assembly hall, bowling alley, dance hall, pool and billiards, theater, skating rink or other social, sport or recreation center operated as a business, provided the place or building in which it is operated is sufficiently sound-insulated to effectively confine the noise to the premises, and provided further that such building or premises is located in conformity with the provisions of Section 347.03; *provided, however, that not more than two of the following uses shall be within 1,000 feet of each other:*

1. Adult motion picture theatre.
2. Adult mini motion picture theatre.
3. Pool or billiard halls.
4. Premises having as their main or primary use pinball machines.

Provided further that the use as specified in subsection L. 1. through 4. inclusive of this subsection shall not be within 1,000 ft. of any adult book store as set forth in Section 343.01; nor within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. [Emphasis added.]

Thus, contrary to the appellant's position, adult bookstores in a general retail area are subject to the spacing requirements of Section 343.01(b)(2)(E) and adult theaters are permitted in such areas subject to Section 343.11(B)(2)(L). Therefore, the requirements of both Sections are

germane to this appeal. Such a reading of these ordinances is consistent with the intent of the Zoning Code, permitting more uses in the less restricted general retail areas.

Under the ordinances then, no more than two adult bookstores or theaters are permitted within 1,000 feet of each other in a general retail area. The evidence herein established that the 16500 Brookpark lot had two buildings on it, one housing an adult mini-movie theater and the other housing a bookstore. On November 30 1983, the City issued a permit changing the use of that establishment from a bookstore to an adult bookstore. This permit was outstanding at the time the appellant applied for a permit at 16700 Brookpark. The appellant insists that the operation of an adult bookstore at 16500 Brookpark had ceased and therefore that permit should not bar the issuance of a permit for 16700 Brookpark. The fact remains that outstanding permits existed for two of the regulated uses at the time of the appellant's application. The issuance of a third permit would have been in direct contravention of the City Ordinances. This assignment is overruled.

II.

The appellant's second and fourth assignments will be addressed together as they present related issues. The appellant's briefs filed in the trial court presented two constitutional issues. First, it argued that the ordinances did not specify whether the spacing restrictions apply when there are two existing regulated uses within 1,000 feet but which are in an adjacent but differently zoned area. Thus, the appellant argued that the ordinances are unconstitutionally vague in that they fail to give a person of ordinary intelligence fair notice that his contemplated

conduct is forbidden by the statute. *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156; *United States v. Harriss* (1953), 347 U.S. 612.

Their second contention is that under the ordinances, adult bookstores receive more favored treatment than do theaters. In support, they argue that bookstores are permitted on a limited basis in local retail areas and are unrestricted in general retail areas. This contention is erroneous. The ordinances regulated bookstores in both areas equally. Their second contention poses more problems. The ordinances prohibit adult movie theaters in local retail areas but permit them subject to certain restrictions in general retail areas. They argue there is no factual basis for the disparate treatment.

The United States Supreme Court has addressed constitutional challenges of a similar Detroit anti-clustering ordinance. *Young v. American Mini Theatres, Inc.* (1976), 427 U.S. 50. Therein the Court addressed First Amendment and Equal Protection issues raised by such ordinances. The Court did not reach the constitutional issues raised by the appellant here.

The trial court did not conduct a trial *de novo* on these constitutional issues. These issues were not raised before nor addressed by the Zoning Board of Appeals since an administrative body lacks authority to determine, the constitutionality of a zoning ordinance. *FRC of Kamms Corner v. Cleveland Bd. of Zoning Appeals* (1984), 14 Ohio App.3d 372. However, a constitutional issue may be raised for the first time on appeal to the Common Pleas Court in a R.C. 2506 proceeding. *State ex rel. Sibarco v. City of Berea* (1966), 7 Ohio St.2d 85; *cert. denied* (1967), 386 U.S. 957. This Court has determined that issues of constitutionality of zoning restrictions must be tried origin-

ally in the Court of Common Pleas. *SMC, Inc. v. Laudi* (1975), 44 Ohio App.2d 325; *Marquette Steel Company v. Cleveland Bd. of Zoning Appeals* (Jan. 3, 1985), Cuya-hoga App. No. 48397, unreported; *McCreery v. Brecksville, Bd. of Zoning Appeals* (Dec. 27, 1984), Cuyahoga App. No. 48396, unreported. We conclude that these issues should have been tried originally in the trial court as scheduled; therefore, the assignments have merit. It was error to deny the appellants an opportunity to present further evidence on the constitutional issues raised rather than summarily dismissing the appeal without a hearing.

III.

In its third assignment of error, Brookpark News contends that in the alternative the Board should have granted a variance to permit its use. The Ohio Supreme Court in *Consolidated Management, Inc. v. City of Cleveland* (1983), 6 Ohio St.3d 238, outlined the three requirements essential for granting a variance. The Court stated:

It is necessary that the board of zoning appeals read, and apply, each subsection of Ordinance Section 329.03 *in pari materia*. Accordingly, in order for the board to grant a specific variance, subsections 329.03 (b)(1), (2) and (3) require that each applicant prove that the zoning classification presents an unnecessary hardship or practical difficulty to the intended use of the property; that refusal of the variance will deprive the owner of substantial property rights; and that the granting of the variance would not be contrary to the intent of the zoning code. [Footnote omitted.]

Id. at 242. The Court in that case specifically found that where the property owner acquired an interest in the prem-

sies with knowledge of the zoning restrictions, he has created his own hardship and cannot thereafter apply for a zoning variance based on such hardship. See also, *Reed v. Rootstown Twp. Bd. of Zoning Appeals* (1984), 9 Ohio St.3d 54. Given the fact that here the appellant entered into a long term lease with knowledge of the zoning restrictions, the appellant has failed to carry its burden of proof in establishing hardship. Furthermore, given the express intent of the anti-clustering provisions the granting of a variance would be directly contrary to the intent of the zoning code. This assignment is overruled.

Although this court from a review of the record made before the Board and the arguments advanced in the briefs might be inclined to rule in favor of the City, we nevertheless are compelled to reverse and remand this case to the trial court. For reasons unknown, the obvious error of the trial court in entering judgment before the scheduled hearing was conducted was not challenged nor called to the trial judge's attention by counsel for either side. No motion seeking clarification, no motion for a new trial, and no request for findings of facts and conclusions of law were ever sought.

For the reasons detailed in Section II of this opinion, the judgment of the trial court is reversed and remanded for a hearing on the constitutional issues raised by the appellant's appeal.

This cause is reversed and remanded for further proceedings consistent with this Journal Entry and Opinion.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NAHRA, P.J., and
KRUPANSKY, J., concur.

/s/ JOHN V. CORRIGAN
Judge

BEST

BUILDING

HOUSING

PERMIT NO. **M 103443**CITY OF CLEVELAND
DEPARTMENT OF COMMUNITY DEVELOPMENT
DIVISION OF BUILDING

3.00

PLAN NO.

FEE S

2 DEC. 1969

IN PURSUANCE OF THE FILING OF THE REQUIRED APPLICATION THERE IS HEREBY ISSUED TO

DENNIS HADRIK USA CLASSIC BUILDING SYSTEMS

REGISTERED CONTRACTOR on behalf of

5530 STATE RD.

JOSEPH WADE

21405 LURAIN AVE.

LOCATION:

16780 FROCKE AVE. RD.

OWNER of property known as:

SUB LOT.....PCL....

C.I. 1145

PERMISSION IS HEREBY GRANTED TO: USE PERMIT

TO USE STRUCTURE AND ADDITION CONSTRUCTED UNDER PERMIT NO. 103447
C. OF O. PAID UNDER PERMIT USE FOR RETAIL SALES OF NEW AND BOOKSPURSUANT TO SECTION 3.0501 OF THE CODIFIED ORDINANCES OF THE CITY OF CLEVELAND, NO. 103447
NEW BUILDING SHALL BE OCCUPIED UNTIL A CERTIFICATE OF OCCUPANCY HAS BEEN ISSUED / 207461

SET BACK:

The work or use authorized by this permit must be started on or before _____ USE PERMIT
and the work authorized completed on or before _____**PERMIT**

The issuance of this permit is for the use or work specified in the application filed therefore and any unauthorized change or alteration from the aforesaid application or plans will render this permit null and void.
 Separate permits must be secured for Plumbing, Wiring, Heating, Elevators, Air Conditioning etc. by Registered or Licensed Contractors ONLY.

THIS PERMIT CONVEYS NO RIGHT TO USE OR OCCUPY ANY STREET, OR SIDEWALK OR PART THEREOF, EITHER TEMPORARILY OR PERMANENTLY.

Keep this Permit Conspicuously Posted on the
Above premises at all times.

CHARLES L. SHEBOY
COMMISSIONER

AVAILABLE COPY

343.11 General Retail Business Districts.
* * * * *(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses:

(1) Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in any Local Retail Business District.

(2) All retail business uses and buildings specified in Section 343.01 (b), and uses and buildings to provide for:

* * * * *

L. * * * that not more than two of the following uses shall be within 1,000 feet of each other:

1. Adult motion picture theatre.
2. Adult mini motion picture theatre.
3. Pool or billiard halls.
4. Premises having as their main or primary use pin-ball machines.

Provided further that the use as specified in subsection L. 1. through 4. inclusive of this subsection shall not be within 1,000 ft. of any adult book store as set forth

in Section 343.01; nor within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland. * * *

REQUEST FOR CHANGE OF USE

CLEVELAND BOARD OF ZONING APPEALS

519 City Hall Cleveland, Ohio 44114 216/664-2580

ANTHONY COSTANZO

Secretary

MICHAEL GAETA

Zoning Engineer

February 21, 1984

CALENDAR NO. 83-359

16700 Brookpark Road

RESOLUTION

WHEREAS, Joseph Wade, owner, and Brookpark News & Books Incorporated c/o Joel Kamensky, tenant, appealed from the decision of the Commissioner of Buildings for permission to convert to an adult book store and adult mini-motion picture theatre the 42' x 73' one-story masonry irregular shaped store building on a 150' x 375' lot located in a General Retail District at 16700 Brookpark Road, said conversion being contrary to the provisions of Sections 343.01 and 343.11 of the Codified Ordinances.

WHEREAS, this property is located on the north side of Brookpark Road, approximately 3000' west of West 150th Street.

WHEREAS, after public notice and written notice mailed to ten directly affected property owners, a public hearing was held February 13, 1984.

WHEREAS, after due consideration of the testimony submitted at the said hearing, the Board finds that the appeal should be refused for the following reasons:

1. The evidence establishes that the property has been located in a General Retail District since 1967; that in 1978 the building was constructed as a restaurant; that in 1981 the building was converted

to a massage parlor; that the property to the east at 16500 Brookpark has located thereon two buildings, one of which is classified as an adult book store and the other as an adult mini-motion picture theater; that the property at 16500 is located in a General Industry District which is not subject to the restrictions relating to adult book stores or adult mini-motion picture theaters; that the Code states that no mini-motion picture theater may be placed in a General Retail District if it is located within 1000' of an adult book store; that the proposed use would be within 280' to 300' of the adult book store at 16500.

2. No exceptional local condition exists in this vicinity to justify the Board in amking [sic] the variance requested.
3. Granting the appeal would be detrimental to the general welfare of the neighbors and to the value of their properties and would be contrary to the intent and purpose of the zoning ordinances.
4. In being refused this appeal, the owner will not suffer an unreasonable hardship since he is not denied any use of property not also denied other owners in that district similarly situated; now therefore,

BE IT RESOLVED that the decision of the Commissioner of Buildings heretofore rendered in the within matter be and the same is hereby sustained and the appeal is refused.

Yea: Jablonski, Schwonek, Palmer

Nay: Cade, Chatman

Approved and adopted by the Board of Zoning Appeals

/s/ **ANTHONY COSTANZO**

Anthony Costanzo, Secretary

BOARD OF ZONING APPEALS

AC:lm

